88-2111

Supreme Court, U.S.
FILED
APR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1988

HARVEY H. TODA,

Petitioner,

V.

CITY AND COUNTY OF HONOLULU,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Harvey H. Toda, pro se
Petitioner
1363 Hoowali Street
Pearl City, Hawaii 96782
(ac 808) 456-1328

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in affirming the Summary Judgment requested in the lower Court?

2. Whether the Ninth Circuit Court of Appeals erred in violating the Rights of Petitioner in a TRIAL, and TRIAL BY JURY?

3. Did the Ninth Circuit Court of Appeals erred in accepting lower Court's verdict, without the explanation of Petitioner?

4. Did the Ninth Circuit Court of Appeals erred in the CONSPIRACY of this case, rather than subjugation upon denials by Petitioner?

5. Did three more discovery identify the reason for this CONSPIRACY?

6. Lawful reasons apparently existed but the subject matter injured Petitioner and the reason is why?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO.

HARVEY H. TODA,

Petitioner,

V.

CITY AND COUNTY OF HONOLULU,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. DISTRICT COURT OF HAWAII

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Harvey H. Toda, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the U. S. District Court of Hawaii, entered in the above-entitled case on Nov. 21, 1986.

Opinions of the United States Court of Appeals For the Ninth Circuit

See appendix iii-1 Exhibit A-1

FILED Feb. 8, 1989
Cathy A. Catterson, Clerk

No. 87-2820
DC No. CV-86-1069-HMF

ORDER

Before: CHOY, O'SCANNLAIN, and TROTT, Circuit Judges

Rehearing DENIED.

Petition with suggestion for rehearing en banc is REJECTED.

(Order cited without date)
(2-8-89, upon phone call by Asst.Dep.Clk. Charlene M. Druzek, received)

Opinion of the United States Court of

Appeals For the Ninth Circuit

See appendix iii-2 Exhibit A-2

FILED Feb. 21, 1989
Walter A.Y.H. Chinn, Clerk

No. 87-2820
DC No. CV-86-1069-HMF

JUDGMENT

Before: Court, cause is AFFIRMED.

A TRUE COPY
ATTEST Feb 16 1989

CATHY A. CATTERSON

Clerk of Court

by: S/S Charlene M. Kluzek
Deputy Clerk

Filed and entered: December 02, 1988

Opinion of the United States Court of Appeals For the Ninth Circuit

See appendix iii-3 Exhibit A-3

Not for Publication

United States Court of Appeals
For the Ninth Circuit

FILED Dec 2 1988
Cathy A. Catterson, Clerk

No. 87-2820
DC No. CV-86-1069-HMF

MEMORANDUM#

U.S.District Court, Dist. of Hawaii
Harold M. Fong, District Judge,
Presiding

Submitted November 16, 1988##
Honolulu, Hawaii

Before: CHOY, O'SCANNLAIN, and TROTT,

Circuit Judges

Appealed District Court's Summary Judgment for the City and County of Honolulu, issues of regulatory taking, procedural due process, infringement of contractual rights, and conspiracy. We AFFIRM.

Case not for public use

The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument.

Toda filed claim:

(1) against infringement of contracts

(2) to due process of law; and

(3) to just compensation

DISCUSSION:

1. de novo entered.
2. Summary Judgment entered due to material fact.
   A. Regulatory Taking
   B. Procedural Due Process
   C. Infringement of Contractual Rights
3. CONSPIRACY CHARGES: allowed summary judgment
4. ex post facto law
   application of new punitive measures to a consumated crime.

Opinion of the United States District Court, District of Hawaii

SEE APPENDIX iii-13 Exhibit B-1

Judgment: FILED 10-8-87
by Walter A. Y.H. Chinn, Clerk

Summary Judgment entered on Decision by Court.

Opinion of the United States District Court, District of Hawaii

SEE APPENDIX iii-15 Exhibit B-2

ORDER: FILED 10-6-87

signed 10-6-87 by Judge Harold M. FONG

alleges just compensation
infringement of contracts
due process of laws
and, CONSPIRACY

Summary Judgment ordered

Opinion Requested: Section 3:835--Certiorari to review case pending in Court of Appeals before judgment:

Tax Appeal Court Case 2485
(Hawaii)

Supreme Court Case 12975
(State of Hawaii)

United States District Court 89-00087 DAE

This case is similar to case 87-2820 and District Court of Hawaii CV86-1069 as now, applied for.

Earlier tie-in DENIED.

Again requested. (Scheduling Conference)

appendix case as iii-27 Exhibit C

The ORDER of panel of judges denied the petition for rehearing, on Feb 8, 1989, under Exhibit A-1.

There was no trial by jury as requested, but a de novo review is suggested under Appendix iii-7, line 6, wherein Petitioner made no Opening Statement nor any Closing Statement for the CONSPIRACY case.

A trial by jury is requested.

JURISDICTION:

Time: Under Rule 20 .4 the request for rehearing was denied on 2-8-89. The judgment was made on December 2, 1988. It AFFIRMED the decision of the lower court.

However, under iii-13, Exhibit B-1, the lower court's DECISION was by the Court.

The RIGHT to trial by jury exists.

Statute of Limitation, does not move until FOUND OUT as Conspiracy.

Fraudulent Taxation, brings in Conspiracy.

Additional reasons and discoveries adds Evidence to Conspiracy.

The State Courts have refused to assist in the Constitutional issue.

The police have referred the matter as Civil Matter. So, has the Prosecutor's Office. The Director of Finance, refused.

QUESTIONS PRESENTED:

1. Why was the property 9-9-19: 01 taxed as residential, given same VALUATIONS as before, the City Government knew of this tax--but did nothing to help owners or Petitioner; after the property was down-zoned to preservation?

2. After ten months, when Petitioner went in to obtain a permit to build a house was denied, as it was a preservation zoned property, and now the VALUATIONS for July 1, 1983 to December 31, 1983 was still the same but the VALUATIONS did have a preservation zoned account. Though notified through an appeal on December 1, 1983, it still remained the same. The Assessor was notified but he did not do anything. The Assessor refused to make any statement on this case.

Why did the TAXES continue?

3. The Taxes remained the same for residential. Though the change to preservation remained the same, the VALUATIONS remained the same area as residential, and thus it was APPEALED TO THE BOARD OF REVIEW. The jurisdiction as provided was for 1984, July 1 to 1985, June 30. Thus, the value was changed from $93,106 to the new approved value of $28,078, or a tax from $607.78 to $189.54, and every 6 months changed from $303.89 to $94.77. The City's law allows a compromise, and why wasn't it done with the time before it?

4. The property was now UPZONED in 1-acre of the 3.7 acres or 203,844 s.f. from preservation to R-10 residential. Marked EXCEPTIONS for deductions was not given, and so appealed. The monetary high was cut-down and 50% deduction of "no pass zone" was instituted. How-

ever, and the upzoned partial taxes were $700.82 to $587.68, or $293.84 every 6 months. The marked exceptions were not taken into effect as it should be. The illegal prior downzoning was not taken for correction. Why should the City forbid correcting their mistakes?

5. Other properties in the Pacific Heights residential areas, Makiki Heights, or many other places were not downzoned, for having steep slopes in their areas. Were there other reasons why this property was downzoned, and now upzoned?

STATUTES INVOLVED

1. The RIGHT to trial by jury, has been requested. Under Amendment 1, the right to redress for grievance(iii-28) is given. Under iii-28, Amendment 7, the Right to trial by jury cannot be injured by a decision of Court.(iii-13)

2. Ex post facto Law: No Decision was given by the City Council, and was told to wait for the NEW LAW by the Land Use Ordinance 86-96. It was made public on 10-22, 1986. Within a month, this case of Conspiracy was initiated. Ord. 86-96 is also a misdemeanor. Ord. 3234 of 1969 has a grandfathering law that provides Double "AA" zones will be called R-3 residential zones. Though the steep hillsides are not a part of the R-3 zone the tie-in of grandfathering the law makes it possible to continue the law. Ord. 3234 is also a misdemeanor. The Ord. 86-96 elliminating 9-9-19:01 as tied-in by Ord. 3234, is a right of Article I Section 10 of the U.S.Constitution. (see iii-31)

3. NOTIFICATION: This zoning was made through Resolution 81, the City and County of Honolulu as an agency, gave RIGHTS to

people living in the agricultural zone area as marked, to obtain a contract or law for its subdivision. Sunset View Lots with 56 lots and a 40 feet driveway was accepted. This was a Territory, but now this is a State, with the Constitution as the Law of the Land.

The Yoon Family converted their agricultural land as zoned into 56 lots with a 40 feet driveway for exit, under Resolution 81; it was accepted by the government and it became law; as marked into book from 1949 till today, and taxes have been paid.

The least the government can do is to NOTIFY people that a new law was to take effect, and the ones involved can make their proper statement.

The Right as governed in this contract cannot be disregarded.

The Hawaii Revised Statues (see

iii-34 & 35) Sec. 101-20 indicates known persons must be notified by legal papers. The Hawaii Revised Statutes Section 46-4 COUNTY ZONING, is the "Enabling Act"(see iii-36) which has a "provision" within that excludes regulations as adopted by any county in effect prior to July 1, 1957.

Without the statement of Petitioner Ord. 81-79 was enacted. Though I feel it illegal, it was again used into Ord. 82-62, outlawing lot of Petitioner with steep hillsides. Sec. 101-20 NOTIFY HRS though property was pegged out and owner known, was refused to be given any notice of tne change in zoning.

Under Amendment 14, Section 1, the U.S.Constitutional RIGHTS to notification for loss of property through due-process and equalization, was violated.

INITATIVE for Revised Charter of the City and County of Honolulu, 1973 (see iii-37)Title 20, Revised Laws of Hawaii, 1955, allowing Honolulu Gov't. Charter.

Sec. 1-101 Revised Ordinances shows a Single Corporation is the City Government.

Sec. 1-103 Structure of Government Revised Ordinances shows that "two branches" of government, is a part of this structure.

See iii-38 as a Legislative Branch, and Executive Branch of the government.

See iii-29 one or several denies the use of one corporation with two branches of government, as only one branch of government is allowed by law.

See iii-41 Revised Ordinances for public hearings under Sec. 13-106, 1 & 2 requires Legislative requirements only.

The Structure of Government:
City and County of Honolulu
Under Rule 28, Filing and Service--
Special Rule for Service Where Constitutionality of Act of Congress or State Statue is in Issue
Document or Brief amicus curiae
under .4 (b) that 28 U.S.C. Sec. 2403 (a)may be applicable and shall be served upon the: Solicitor General
Department of Justice
Washington, D.C. 20530
is requested to check on page 12, Statute involved, and below of the various questions or sub-allegations of this report.

The Mayor of the City and County of Honolulu is also a part with the City Council who are the legislators.
This corporation is a subsidiary of the State of Hawaii, as a county.

first-class postage prepaid
with mailing envelope
to his address, as written.
Can the Solicitor General decide
the RIGHTS for Petitioner? The Corporation Counsel refuses to admit knowledge to the Taxation given as a Fraud, and refuses to admit the sub-allegations mentioned in this report.

STATEMENT OF CASE:

This Conspiracy case was brought up in the Federal Courts.

Within 30 days, it must be reported to the Court, or it loses timeliness.

The City and County of Honolulu took from December 1, 1983, case turned over to the City Council, Reconsidered, and no Decision obtained. It was to await public sale of Ord. 86-96.. Witnin the 30 days after the public sale of Ord. 86-96, and this report is made. Because it was of Constitutional Matters, it was decided as a Federal Case after due-cause was made known to the City and County of Honolulu, and they refused participation. If the City would handle this matter, then, there would be no exercise of any court action with the Federal Government.

Because, nothing would matter, a suit began. This shows action.

REASONS FOR GRANTING WRIT:

A scheduling hearing as required in the Conspiracy Case with sub-allegations that should be considered within the suit, was initiated. Judge Conklin scheduled the hearings.

Judge Fong then had hearings relative to requests of Defendants. However, this had no Constitutional Matter, and a tie-in with the State Civil Courts with similar violations was denied.

A summary judgment requested was denied. Defendant wanted to know more of this case and so given a deposition. It was felt that she obtained whatever she wanted to know. Now, the same request for a summary judgment is given by defendant. Though it was never approved it remained open, and a DECISION BY COURT showed it to be a SUMMARY JUDGMENT.

The Trial by Jury, is pending.

ARGUMENT:

The Ninth Circuit Court of Appeals affirmed the Summary Judgment of the lower Court. The same statement as given by the lower Court is duplicated.

The Ninth Circuit Court of Appeals approved the hearing, as called a "de novo"and substantiated. The requested TRIAL and TRIAL BY JURY, stands. This has not taken place as yet.

The Ninth Circuit Court of Appeals approved the findings of the lower Court, and I believe there was an error. The lower Court stated that my signture to sub-allegations, including that of conspiracy(target crime), was not my issue, in this case. That, CONSPIRACY in the sense of injuring Petitioner was at fault--that it probably was a legal matter, and not a crime.

At the proposal for a scheduling conferance the subject matter for a hearing was denied. Although it was denied, Judge Fong allowed a hearing and it was mentioned that a CONSPIRACY was the case and other sub allegations that went with it. The Deputy Corp. Counsel arranged a "Deposition" and asked if it was possible to sign off the items not to sue the City. CONSPIRACY, could not be signed off, but the (target crime) conspiracy of crime and its sub-allegations were agreed to be signed, and she made an agreed-statement and it was signed. By this reasoning, the lower Court felt that the sub-sections were signed off, including that of(target Crime)Conspiracy, and declared a Summary Judgment.

The loss of overtaxation, notification, Civil Rights Violation, the loss of just compensation, infringement of contracts by the City under Resolution 81

brought as LEGAL R-3 Subdivision as a RESIDENTIAL under Tax Appeal Court 1798 by the Court in 1978 and closed with an agreed-statement then, under Ordinance 3234 Comprehensive Zoning Code, of 1969. Also, under Ord. 86-133 Sec. 3, it allows the inclusion of R-3 Residential and the violation of ex post facto law.

In UPZONING the property, the cost figures were discovered to be too high and without the person present, it was brought down, then further brought down by the Attorney, then further brought down by the Trial Court. The matching amount is in error, and the finance dept. apparently filed it wrong. My corrected amount should be lower, if accepted.

In checking against the laws, it was found that two-branches of government is tied into a Corporation. My discovery indicates that another INITIATIVE is

necessary.

Why, was this constant injury done to Petitioner? Persons exposed to this item has been asked, but none have stated anything to add to the matter.

CONCLUSION:

Punitive Damages though it be legal and probably done with honest intent, is injuring this Petitioner.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Harvey H. Toda pro se
for Petitioner

June 26, 1989.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT FILED

HARVEY H. TODA,	Feb. 8, 1989
Plaintiff-Appellant,	Cathy A. Catterson, Clerk
v.	U.S.Court of Appeals
CITY AND COUNTY OF HONOLULU,	No. 87-2820
Defendant-Appellee.	DC No. CV-86-1069-HMF
	ORDER

Before: CHOY, O'SCANNLAIN, and TROTT, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Trott have voted to reject the suggestion for rehearing en banc, and Judge Choy has so recommended.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

(Called by Phone) S/S 2-8-89

by Charlene M. Druzek, Asst.Dep.Clk.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARVEY H. TODA, Plaintiff-Appellant, vs. CITY AND COUNTY OF HONOLULU, Defendant-Appellee.	FILED IN THE U.S.DIST.CRT. DIST.OF HI. Feb. 21, 1989 at 9 o'clock and 40 min. A.M. WALTER A.Y.H. CHINN, CLERK No. 87-2820 DC CV 86-1069 HMF

APPEAL from the United States District Court for the District of Hawaii(Honolulu)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii(Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said

District Court in this Cause be, and hereby is Affirmed.

A TRUE COPY
ATTEST Feb 16 1989

CATHY A. CATTERSON

Clerk of Court

by: S/S Charlene M. Kluzek
Deputy Clerk

Filed and entered December 02, 1988

Exhibit A-3

Not for publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Dec 2 1988
Cathy A. Catterson, Clerk
U.S.Court of Appeals

HARVEY H. TODA,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF HONOLULU,

Defendant-Appellee.

NO. 87-2820

DC No. CV-86-1069-HMF

MEMORANDUM#

Appeal from the United States
District Court for the District
of Hawaii
Harold M. Fong, District Judge,
Presiding

Submitted November 16, 1988##
Honolulu, Hawaii

Before: CHOY, O'SCANNLAIN, and TROTT,
Circuit Judges

Harvey H. Toda Appeals the District court's summary judgment for the City and County of Honolulu ("Honolulu") on the issues of regulatory taking, procedural due process, infringement of contractual rights, and conspiracy. We affirm.

FACTS AND PROCEEDINGS

This action arises out of the change in zoning of real property identified as Tax Map Key Number 9-9-19-01 situated on Welelau Place, Aiea Heights, State of Hawaii. In November of 1942, Honolulu established an "AA" residential zoning for the

---

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

---

subject property. In 1963, Toda and his wife purchased the real property as tenants by the entirety. In 1969, Honolulu rezoned the subject parcel to "R-3" residential pursuant to a Comprehensive zoning code. In 1981, Honolulu adopted a development plan for the Primary Urban Center which down-designated the parcel to "Preservation." In 1982, the parcel was down-zoned to "P-1" preservation by Honolulu's adoption of Zoning Map No. 7. In 1985, one acre of the subject property was redesignated "residential" by amendment of the development plan for the Primary Urban Center. In 1986,

that one acre portion was rezoned "R-10" Residential by amendment to Zoning Map No. 7.

Toda filed a claim in the district court alleging that Honolulu had violated his constitutional rights: (1) against infringement of contracts; (2) to due process of law; and (3) to just compensation. Each of these claims had various sub-allegations.

At a hearing before Judge Fong, on Honolulu's motion for summary judgment, Toda appeared to withdraw several of his complaints, and the remaining claims were dealt with by way of summary judgment. The order was filed and summary judgment granted to Honolulu on the issues of regulatory taking, infringement of contractual rights, procedural due process, and conspiracy. Toda filed an appeal before the order was filed, but after the hearing, thus, pursuant to Fed. R.

App. P. 4(a)(1) and (2), the notice is timely.

DISCUSSION

1. Standard of Review

A district court's entry of summary judgment is reviewed de novo. T.W.Elec. Serv., Inc. v Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir.1987).

2. Appellant's Constitutional Claims

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, when a motion for summary judgment is made and supported as provided by the rules, the adverse party "must set forth specific facts showing that there is a genuine

issue for trial." Fed. R. Civ. P. 56(e). Toda here did not set forth any genuine issue of material facts, thus leaving none in dispute. The district court applied the applicable law to the undisputed facts.

A. Regulatory Taking

The Supreme Court held in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), that a just compensation claim based upon a regulatory taking is not ripe for review by the federal court until the concerned party has: (1) sought and received a final decision by the proper governmental authority responsible for implementing the regulation, id. at 186; and (2) sought and been denied compensation through state procedures. Id. at 195. Such adjudications allow factfinding for which the state agency is particularly qualified, and ensures that the claim is

ripe for review. Id.; Kinzli v City of Santa Cruz, 818 F.2d 1449, 1453-54 (9th Cir. 1987), amended, 830 F.2d 968 (1987), cert. denied, 108 S. Ct. 775 (1988). Toda has never claimed that a development plan of his was rejected by the authorities. Therefore, under Hamilton Bank, this case cannot be considered ripe for review. The district court properly granted summary judgment to the City and County of Honolulu on this matter.

B. Procedural Due Process

Toda claims that he was denied procedural due process because Honolulu did not inform him of its zoning changes. This circuit has ruled that the enactment of a general zoning ordinance is a legislative act, Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349-50 (9th Cir. 1982), which does not require procedural due process to anyone affected by it. Texaco v. Short, 454 U.S. 516, 531-38 (1982); O'Neill v. Town of Nantucket,

711 F.2d 469, 471 (1st Cir. 1983). Therefore, the district court properly found that the zoning ordinances about which Toda complains need not have been preceded by notice to the landowners concerning their implementation.

C. Infringement of Contractual Rights

Toda also argues that his purchases of the property and his payment of property taxes vested in him the right to retain the property, zoned as it was when he first purchased it. The zoning regulations established on Toda's property do not constitute a contract between Honolulu and Toda. Therefore, the zoning remained subject to modification. See generally Texaco, 454 U.S.at 532-33.

Therefore, the district court was correct when it held that no constitutional violation of contract had occurred as a result of Honolulu's zoning regula-

tions.

3. Conspiracy Charges

Toda contends that Honolulu comspired to downzone his property so that it could later acquire his property at a reduced value for its use as a sewage facility. Honolulu submitted the affidavits of personnel in charge of sewage station development, Yamashita and Honke, stating that they had no knowledge that Honolulu planned on using Toda's property as a sewage pump station. According to Fed. R. Civ. P. 56(e), Toda was required to set forth specific facts in light of these affidavits. His failure to do so allowed summary judgment on this issue.

4. Ex Post Facto

Finally, Toda presents a new argument on appeal that the zoning laws violated the Constitution in that they were ex post facto. Even if this court were to hear the claim at this time, it

could not grant Toda any relief on this ground. Ex post facto laws only prohibit the application of new punitive measured to a consummated crime. Lindsey v. Washington, 301 U.S. 397, 401 (1937). This court is not presented with an ex post facto claim involving a crime.

CONCLUSION

The disttict court appears to have dealt with all of the issues before it. Given the multifaceted nature of Toda's allegations, the district court did an admirable job of sifting his contentions so as to separate out and dispose of the above arguments.

We uphold the district court's summary judgment dismissal of all of Toda's claims.

AFFIRMED.

iii-13 Exh. B-1

UNITED STATES DISTRICT COURT

District Of Hawaii

HARVEY H. TODA,

V.

CITY AND COUNTY OF HONOLULU

JUDGMENT IN A CIVIL CASE

Case No: 86-1069

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Summary Judgment is entered in favor of Defendant and against Plaintiff.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Oct 8 1987

at 1 o'clock and 40 min. P.M.

Walter A.Y.H. Chinn, Clerk

cc: all counsel

October 8 1987

s/s L A
Clerk

(By) Deputy Clerk

iii-15 Exh. B-2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HARVEY H. TODA, Plaintiff, vs. CITY AND COUNTY OF HONOLULU, Defendant.	CIVIL NO. 86-1069 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED IN THE U.S.DISTRICT COURT District of Hawaii at 9 o'clock and 40 min.P.M. WALTER A.Y.H. CHINN, CLERK

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's Motions for Summary Judgment and Dismissal of the Complaint came before this Court for hearing on September 8, 1987. Diane T. Kawauchi, Deputy Corporation Counsel, City and County of Honolulu, appeared on behalf

of Defendant, and Plaintiff appeared pro se. The Court having reviewed the motion and the memorandum and affidavits in support thereof, and memorandum in opposition thereto, having further reviewed the stipulations of the parties, having heard the arguments of the parties and being fully advised in the premises therein, finds and orders as follows:

Plaintiff is the owner of the subject real property located on Welelau Place, Aiea Heights, City and County of Honolulu, and identified as Tax Map Key Number 9-9-19-01. In November of 1942 Defendant established an "AA" residential zoning for the subject property. In 1969, Defendant's Comprehensive Zoning Code rezoned the subject parcel "R-3" residential. In 1981, Defendant adopted the Development Plan for the Primary Urban Center, which down-designated the parcel to "Preservation." In 1982, by Defendant's adoption of Zoning Map No. 7,

the parcel was downzoned to "P-1" Preservation. In 1985 Defendant redesignated a one-acre portion of the subject property by amendment to the Development Plan for the Primary Urban Center to "Residential," and in 1986 said one-acre portion was rezoned "R-10" Residential by amendment to Zoning Map No. 7.

Plaintiff's Complaint alleges that Defendant's actions in down-designating and downzoning the subject property to preservation uses violated rights guaranteed to Plaintiff in the United States Constitution to just compensation, against infringement of contracts, and to due process of the laws. In addition, Plaintiff has alleged a conspiracy against Plaintiff in said actions of Defendant. The Court has reviewed the stipulations submitted by the parties as to facts and the withdrawal of claims

and is unclear as to whether said stipulations dispose of all of the cause of actions alleged in the Complaint, and therefore the Court will address each issue separately herein.

I. Regulatory Taking

The United States Supreme Court has held in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S.172 (1985) and followed in MacDonald, Sommer & Frate v. Yolo County, 106 S. Ct. 2561 (1986), that regulatory taking claims are not ripe for adjudication in the federal court until the governmental entity charged with implementing the land use regulations has reached a final decision regarding the application of the regulations to the property at issue, and the Plaintiff has sought and been denied compensation in the state court. Under

the decision in Hamilton Bank, a final and authoritative determination requires not only that Plaintiff has submitted a development plan for the property which was rejected, but also that Plaintiff sought variances or waivers which would permit uses not allowed under the regulations.

In support of its argument that Plaintiff's regulatory taking claim is not ripe for adjudication, Defendant has submitted the Affidavit of Loretta Chee who is employed in the Defendant's Department of Land Utilization and who testifies that the records of the applications for variance of zoning provisions maintained by said Department do not include any application submitted by Plaintiff for the subject property at any time after the effective date of Zoning Map No. 7 on December 23, 1982, which downzoned the subject parcel to "P-1" Preservation. The Plaintiff has submitted no evidence

to contradict the Affidavit of said Loretta Chee nor has Plaintiff submitted any other evidence to rebut Defendant's contention that this claim is not ripe for adjudication and, accordingly, the Court rules that summary judgment is warranted on Plaintiff's claim of a regulatory taking following the decisions in Hamilton Bank and Yolo County.

II. Infringement of Contractual Rights

The Court finds no infringement of any contractual right by Defendant's action in downzoning the subject property. Plaintiffbased this claim of Constitutional violation in part on the following language of Section 46-4(a), Hawaii Revised Statutes ("HRS"):

> Nothing in this section shall invalidate any zoning ordinance or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The Court rules, as a matter of law, that

Section 46-4 (a), HRS, affords Plaintiff no contractual rights to the continued residential zoning of the subject parcel.

Plaintiff also alleged that the deed to the property constituted a contract with Defendant which afforded Plaintiff the right to continued residential zoning. On this point the Court concludes that even if a contractual relation did exist between the parties, the Contract Clause of Article 1 of the U.S.Constitution does not operate as an absolute prohibition but rather guards against impairment of contractual obligations only when such infringement is substantial. Zoning and land useregulations are the most fundamental of police powers of the state and are suspect only when exercised with abuse of discretion. However, where the property owner has been damaged by illegal zoning or land use regulations, the

property owner is entitled to compensation in the state and not the federal court. The Court notes that punitive damages are not recoverable against Defendant.

As the Court finds the absence of any material disputed fact, the Court concludes that summary judgment is warranted and grants Defendant's motion on the claim of infringement of contractual rights.

III. Procedural Due Process

Plaintiff claims that he is entitled to personal notice of Defendant's action in downzoning the subject property by virtue of Defendant's Ordinance No. 84-111 and the Fourteenth Amendment of the U.S. Constitution. The Court notes that the parties have stipulated to the withdrawal of Plaintiff's claim based upon the alleged violation of Defendant's Ordinance No. 84-111, and it is clear to the Court that said ordinance is inapplicable herein, it having taken effect

after the adoption of the ordinance down-zoning Plaintiff's property.

With regard to the right to procedural due process guaranteed in the U.S. Constitution, the Supreme Court has recognized the distinction to be made between legislative and administrative actions of government and the notice requirements attendant thereto as mandated by the Constitution. Bi-Metallic Investment Co., v. State Board of Equalization, 239 U.S. 441 (1915). Where the action is legislative, personal notice is not required by the Constitution, and the 9th Circuit has held that as a matter of law the enactment of a general zoning ordinance, such as Defendant's Zoning Map No. 7, is a legislative act. Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982). The Court notes that the parties have stipulated that notice by

publication was provided for Defendant's adoption of ordinance No. 81-79, which enacted the Development Plan for the Primary Urban Center, and Ordinance No. 82-62, which enacted Zoning Map No. 7. Accordingly, the Court finds that summary judgment in Defendant's favor is warranted on the issue of procedural due process.

IV. Conspiracy

Plaintiff alleges that the subject property was downzoned for the benefit of subsequesnt acquisition by Defendant for a sewer facility. In support of its motion for summary judgment, Defendant offered the Affidavit of Raymond Yamashita of the Defendant's Department of General Planning, who testifies that he recommended redesignation of the subject property to "Preservation" in the process of preparing the Development Plan for the

Primary Urban Center and that his recommendation was not due to any knowledge of a planned sewer facility for Plaintiff's property. Defendant also offered the Affidavit of James Honke of the Defendant's Department of Public Works, Division of Wastewater Management, who testifies that said Division is charged with the function, among other things, of designing and site selection for wastewater facilities. Mr. Honke testifies that he has reviewed the records of said Division, and Plaintiff's property was not designated as the site for a pump station for the period 1979 through 1986 in any of said records.

The Court finds an absence of an issue of fact and accordingly finds it appropriate to grant Defendant's motion for summary judgment on the issue of conspiracy.

V. Conclusion

All issues in Plaintiff's Complaint, having been addressed in Defendant's motion for dismissal and for summary judgment, and the Court having found good cause to grant summary judgment in Defendant's favor on the issues of regulatory taking, contractual obligations, procedural due process and conspiracy, this order hereby concludes this matter.

DATED: Honolulu, Hawaii, Oct 6 1987 .

S/S Harold M. Fong
UNITED STATES DISTRICT JUDGE

CIVIL NO. 86-1069
TODA v. CITY AND COUNTY OF HONOLULU
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

iii-27 Exh. C

Under 2 Federal Forms Page 374

Section 3:835--Certiorari to review case pending in Court of Appeals before judgment: Tax Appeal Court Case #2485

Awarded: but appealed for lack of Constitutional violations and illegality

Hawaii SUPREME COURT CASE 12975

Order: rehearing denied. AFFIRMED

United States District Court

For the District of Hawaii

Civil No. 89-00087 DAE

Fraudulent Taxation of Real Property, and other similar Constitutional violations and illegality

This case is the same as Case 87-2820 and District Court CV86-1069 of the United States Court of Appeals and is requested be tied-in.

U.S.Constitution: Amendment 1 (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.Constitution: Amendment 7 (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S.Constitution: It could possibly be ARTICLE 1, 2, 3, 6,or any other To have ONE CORPORATION allow within its offices ONE BRANCH of government.

U.S.Constitution: Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution: Amendment XIV (1808)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.Constitution: Article I

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Maque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Partial Reports of Constitution./hht
Underlined WORDS as noticed./hht

BLACK'S LAW DICTIONARY, 5th Edition, by The Publishers Ed. Staff, St. Paul, Minn. West Publishing Co. 1979; Pages 280,281

CONSPIRACY:(a partial explanation)

A combination of confederacy between two or more persons formed for the purpose of committing by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.

.....

Crime of conspiracy is distinct from the crime contemplated by the conspiracy (target crime). Com. v. Dyer, 243 Mass. 472, 509; etc.

A conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose.Creg v. U.S. C.C. A. Cal. 81 F.2d 816, 822.

.....

.....

Hawaii Revised Statutes: Sec. 101-20 NOTICE. When the owner or claimant of the land sought to be condemned is known, the summons shall be served by delivering to the owner or claimant, or to an agent authorized by appointment or by law to received service of process, a certified copy thereof, together with a copy of the plaintiff's complaint. If the owner or claimant, although known, was never a resident of the State or has removed therefrom or cannot for any reason be served with process within the State, or if the owner or claimant is unknown, then the service of the summons upon the owner or claimant may be made in the manner provided by sections 634-23, 634-24, and 634-26. If the defendants are joined in the complaint by describing them as a class, then the service of the summons upon the defendants may be made by publication in a newspaper of general

circulation in the county in which the property is situated, in the manner provided by sections 634-23(3) and 634-26, and by giving such further notice as the court may order. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case. (.... ....) ...

.....

.....

Hawaii Revised Statutes: (The Enabling Act)

Section 46-4 COUNTY ZONING. (a) This section and any ordinances or rules and regulations adopted in accordance with it, shall apply to those lands not contained within the forest reserve bounderies as established on January 31, 1957, or as subsequently amended.

.....

..... (the "provision" follows)

Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

.....

REVISED LAWS OF HAWAII: (the Territorial Government--Title 20: Hon.Govt.Charter Commission)(partial pg.888, 889, 1955)

Section 149A-1 Charter Commission

....

Section 149A-3 Duties and functions of commission; proposed charter.

.....

Section 149A-4. Submission of Charter to Supervisors.

.....

Section 149A-5. Submission of charter to electors.

.....

Section 149A-6. Ratification of Charter by legislature; effect.

.....

(the REVISED ORDINANCE OF HAWAII, as incorporated) (through INITIATIVE)

REVISED ORDINANCES: Incorporation

Section 1-101 Incorporation--The people of the City and County of Honolulu shall be and continue as a body politic and corporate by the name of "City and County of Honolulu", hereinafter in this charter called "city". By that name it shall have perpetual succession.

Section 1-103. Structure of Government--The government provided by this charter shall consist of two coordinante branches to be known as the "legislative Branch" and the "Executive Branch".

REVISED ORDINANCES: Real Property Tax Section 8-1.2 (12) Compromises: With the approval of the Corporation Counsel, to compromise any claim arising under this chapter not exceeding $500 and if a claim exceeds $500, the director shall obtain the approval of the City Council, the administration of which is within the scope of his duties: and in any such case, there shall be placed on file and in his department's office a statement of (A) the amount of tax assessed, or proposed to be assessed, (b) the amount of penalties and interest imposed or proposed to be assessed, (c) the amount of penalties and interest imposed or which could have been imposed by law with respect to the item (A) as computed by him, (D) the total amount of liability as determined by the terms of the compromise, and the actual payments made there-

on with the dates thereof, and (E) the reasons for the compromise.

(13) Retroactivity of rulings: To prescribe the extent, if any, to which any ruling, regulations, or construction of the provisions of this chapter shall be applied without retroactive effect.

Taken from Section 8-1.2 of 1978 Supplement, Revised City Ordinances of Real Property Tax, page 37.

Revised Ordinance:

Section 13-106 Public Hearings: Notice--

1. No public hearing shall be held by any agency or the council, unless public notice is given prior to such hearing.

2. Notice of any public hearing shall be adequately publicized at least ten days prior to such hearing in a daily newspaper of general circulation in the city and may be advertised, as deemed helpful, in such other newspapers and through communications media as will afford the public maximum information concerning such hearing. The notice shall include:

(a) The date, time and place of such hearing.

(b) A statement in plain language of the nature or purpose, including the issues involved, if any, of such

hearing.

(c) A statement that all interested persons shall be afforded the opportunity of being heard.

Section 13-107. Title to Property--Except as otherwise provided by law, title to all property acquired by any agency of the city shall be vested in the city.

BLACK's LAW DICTIONARY, 5th Edition
by the Publishers Ed. Staff
St. Paul, Minn., West Publishing Co.
1979, Page 520

Ex post facto law: .....

An "ex post facto law" is defined as a law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent; a law which aggravates a crime or makes it greater than when it was committed; a law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed; a law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender; a law which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a

right which, when done, was lawful; a law which deprives persons accused of crime of some lawful protection to which they have become entitled, such as the protection of a former conviction or acquittal, or of the proclamation of amnesty; every law which in relation to the offense or its consequences alters the situation of a person to his disadvantage. Wilensky v. Fields, Fla. 267 Co.2d 1, 5

REVISED ORDINANCES: Sec. 8-1.25.Neglect of Duty; etc., Misdemeanor.

Any officer or employee of the Department of Finance, any person duly authorized by the director, or any police officer, on whom duties are imposed under this chapter, who wilfully fails or refuses or neglects to perform faithfully any duty or duties of him required by this chapter, shall be deemed guilty of a misdemeanor.
(Am. Ord. 80-72)

3:844 Request--To clerk of court possessed of record--For certification and transmission of all or part of record--by petitioner:

To: Assistant Clerk Suzy McDivitt, Clerk of Supreme Court of the United States:

Pursuant to Rule 21(1) of the Rules of the Supreme Court, you are hereby requested by Harvey H. Toda, petitioner, to certify and transmit to the Supreme Court of the United States the _____

(entire record or following designated parts of the record)

herein.

(where applicable, designate parts of record to be certified and transmitted).

Date: May 5, 1989.

Harvey H. Toda pro se
for petitioner
1363 Hoowali Street
Pearl City, Hawaii 96782

IN THE

URT OF THE UNITED STATES

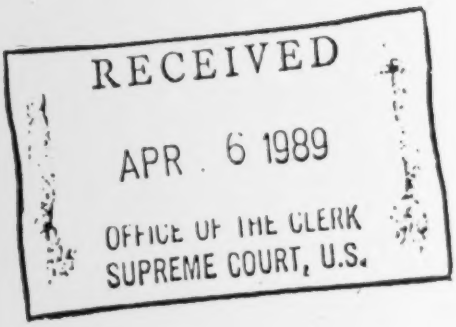
TOBER TERM 1988

NO.

TODA,

PETITIONER,

v.



unty Of Honolulu,

RESPONDENT.

VE TO PROCEED AS PER SE

e 12 .1 the case is being docketed

. and also under Rule 12 .3.

u, Hawaii, March 28, 1989.

Harvey M. Toda pro se
for Petitioner

STATEMENT OF RELATED CASES

Tax Appeal Court Case 2485 (City)
Supreme Court Case 12975, State of Hawaii
Tie-in DENIED, to 86-1069, now 8900087DAE

However, this is the same case as tied-in, through the violation of law in a civil way. As, the Director of Finance was subpoenaed, but refused entry by the Dep. Corp. Counsel, and approved by the Court. Though the initial cost of moneytary value was adjudicated in Court, the Illegality, and, Constitutional violations, were not accepted. The 4 reasons for this case is for TRIAL, as TRIAL BY JURY.

Notification through 84-111, revised ordinances, is still in the Circuit Court, and is not used in this case.

Undersigned is not sure of other cases.

CERTIFICATE OF SERVICE

I, Harvey H. Toda, provides 3 copies of this report for PETITION FOR THE WRIT OF CERTIORARI, through the Sheriff's Office of the State of Hawaii, to:

RICHARD D. WURDEMAN
Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
Telephone: (808) 523-4115

Attorney for the City and County of Honolulu

Respondent.

DATED: Honolulu, Hawaii, June 26, 1989.

Harvey H. Toda pro se
for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

NO.

HARVEY H. TODA,

Petitioner,

V.

CITY AND COUNTY OF HONOLULU,

Respondent.

PROOF OF SERVICE

State of Hawaii)
) SS.
City and County of Honolulu)

Affiant, HARVEY H. TODA, after being duly sworn, disposes and says that pursuant to Court rules he served the within papers for Writ of Certiorari, to:

RICHARD D. WURDEMAN, Corporation Counsel, City and County of Honolulu, Honolulu, Hawaii 96813

Attorney for City and County of Honolulu

Respondent

Serviced by:

Sheriff Officer Norman K. Nakamaka

Date 6-26-89 1:25 P.M.

Received by Jane W. Howell, Deputy Corporation Counsel

Date 6-26-89

Position Deputy Corporation Counsel

Harvey L. Toda

Harvey H. Toda Affiant
pro se for Petitioner

Subscribed and Sworn to Before Me
this 24 day of June, 1989.

Jeanette M. L. Abiva

Notary Public
City and County of Honolulu
State of Hawaii

JEANETTE M. L. ABIVA NOTARY PUBLIC STATE OF HAWAII

My Commission Expires on: 10/25/92

(2)

No. 88-21-41

FILED
JUL 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

HARVEY H. TODA,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

DONNA M. WOO,
Counsel of Record
MARIA C. AVINANTE-TANAKA,
Deputy Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
(808) 523-4704

Attorneys for Respondent
City and County of Honolulu

QUESTIONS PRESENTED FOR REVIEW

Respondent City and County of Honolulu (hereinafter referred to as "City") believes that the question presented to the Court for review is whether the Ninth Circuit was correct in its decision to affirm the district court's summary judgment for the City on the issues of regulatory taking, procedural due process, infringement of contractual rights and conspiracy.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-21-41

HARVEY H. TODA,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an appeal by Plaintiff from the Ninth Circuit's affirmation of the Court's Order Granting Defendant's Motion for Summary Judgment. The action arises out of the downzoning of vacant unimproved real property identified as lot number 1 of the "Sunset View Lots" tract situated on Welelau Place, Aiea Heights, State of Hawaii, and containing an area of 203,844 square feet. Plaintiff purchased the real property in 1963 as tenants by the entirety with his wife. In November 1942 the parcel was zoned "AA" residential by Resolution No. 81 of the City and County of

Honolulu. Under the 1969 Comprehensive Zoning Code of the City and County of Honolulu, Ordinance No. 3234, the parcel was rezoned "R-3" residential. Subsequently, in 1981, the Development Plan for the Primary Urban Center, *i.e.*, the area from Waialae-Kahala to Pearl City (Ordinance No. 81-79), designated the parcel "Preservation," and in 1982 the zoning for the entire parcel was downzoned to "P-1" preservation by the adoption of Zoning Map No. 7, which encompassed the area from Halawa to Pearl City (Ordinance No. 82-62), in accordance with the said Development Plan designation.

Thereafter, by amendment of the Development Plan for the Primary Urban Center in 1985 (Ordinance No. 85-46) and amendment of Zoning Map No. 7 in 1986 (Ordinance No. 86-133), a one-acre portion of the parcel was upgraded to a residential designation and "R-10" residential zoning, respectively. The balance of the parcel retains a preservation designation and zoning.

Defendant provided notification of its intention to adopt the Development Plan for the Primary Urban Center, Ordinance No. 81-79, and Zoning Map No. 7, Ordinance No. 82-62, by newspaper publication.

In 1986, the Land Use Ordinance, Ordinance No. 86-96, effective October 22, 1986, superseded in its entirety the provisions of the Comprehensive Zoning Code, Ordinance No. 3234. The Land Use Ordinance renamed the "P-1" preservation zoning of the subject parcel to "P-2" preservation.

Defendant is a duly constituted municipal corporation of the State of Hawaii. Plaintiff is a resident of the City and County of Honolulu, State of Hawaii, and no diversity of jurisdiction was alleged.

Jurisdiction of the District Court was invoked by Plaintiff on the grounds of federal question. In his Complaint, Plaintiff alleged violations of rights guaranteed to him under the provisions of the United States Constitution, specifically (1) the right against infringement of contracts, (2) the right to due process of law, and (3) the right to just compensation. Complaint, p. 2, ¶¶ 1 and 2 of "Complainant." With respect to the right to just compensation, Plaintiff alleged that the downzoning of the subject parcel based upon the slope of the land was arbitrary and capricious, and discriminatory in that other parcels of land with similar slopes were not downzoned. Plaintiff alleged that the subject parcel may have

been downzoned to depress the value of the land to the Defendant's benefit for future acquisition as a sewage pump station site.

With respect to the right against infringement of contracts, Plaintiff alleged that State statute, Hawaii Revised Statutes ("HRS") Section 46-4 (Appendix A at 1a), together with the 1949 deed for the conveyance of the subject parcel to Plaintiff's predecessor in title, guaranteed to Plaintiff the residential zoning of the subject parcel established in November 1942 by Resolution No. 81. With respect to the right to due process of the laws, Plaintiff alleged that Defendant failed to notice him of the consideration of the subject parcel for downzoning prior to the enactment of the applicable Development Plan and zoning ordinances in violation of the Fourteenth Amendment of the Constitution and of City and County of Honolulu Ordinance No. 84-111, effective December 7, 1984, which requires notification by mail to property owners affected by a development plan land use map amendment.

On September 8, 1987 and prior to the District Court's entertainment of the argument on Defendant's Motion for Summary Judgment and Dismissal of Complaint, the Court received two stipulations withdrawing several of Plaintiff's claims in the suit. By stipulation submitted by Defendant, Plaintiff withdrew claims against Defendant as to (1) denial of equal protection of the laws guaranteed by the United States and Hawaii Constitutions, (2) violation of City and County of Honolulu Ordinance No. 84-111, and (3) denial of just compensation guaranteed by the United States and Hawaii Constitutions. By stipulation submitted by Plaintiff, Plaintiff withdrew claims against Defendant as to (1) family intrusion created by the case against owners, and (2) 1987 zoning regulations without exemptions but conspiracy charges pending its completion in State of Hawaii, Tax Appeal Court.

The trial of the lawsuit in the District Court was scheduled to commence at 9:00 a.m. on September 9, 1987.

REASONS FOR DENYING THE WRIT

I.

MR. TODA'S PETITION FOR CERTIORARI FAILS TO PRESENT ANY SUBSTANTIAL OR IMPORTANT REASONS FOR REVIEW OF THE CIRCUIT COURT'S DECISION

Rule 17.1 of the Rules of the Supreme Court of the United States provides that a "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." While the rule does not specifically address what constitutes "special and important" reasons to support a writ of certiorari, the rule does provide some guidelines to indicate the "character of the reasons that will be considered" by the Court. These guidelines include:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision;
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals;
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of the above reasons, however, are present in this Petition filed with this Court.

II.

NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE NINTH CIRCUIT, NOR DID THE NINTH CIRCUIT'S DECISION IN ANY WAY CONFLICT WITH THE DECISIONS OF THIS COURT.

It is the position of the City that no important question of federal law is implicated by the Ninth Circuit's decision that the procedures available in Hawaii are facially adequate. In addition, the City believes that the Ninth Circuit's decision is consistent and does not in any way conflict with the decisions rendered by this Court.

A. The Decision By The Ninth Circuit Only Involves The Review Of The District Court's Entry of Summary Judgment.

A district court's entry of summary judgment is reviewed *de novo. T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 629 (9th Cir., 1987).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, when a motion for summary judgment is made and supported as provided by the rules, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Plaintiff here did not set forth any genuine issue of material facts to the Ninth Circuit or District, thus leaving none in dispute. The district court applied the applicable law to the undisputed facts.

Defendant moved the District Court for summary judgment and dismissal of the Complaint on the issues of (1) regulatory taking, (2) procedural due process, (3) infringement of contractual rights, and (4) conspiracy. Defendant's motion was supported by Affidavits, as well as statutory references and case authorities. Although Plaintiff submitted a responsive pleading together with an Affidavit of Plaintiff, Defendant contends that the factual matters set

forth in Defendant's Affidavits were not refuted, nor did Plaintiff set forth any legal authority contrary to the position argued by Defendant in said motion.

Pursuant to Rule 56(c), Federal Rules of Civil Procedure ("FRCP"), summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FRCP Rule 56(e) further provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (Emphasis added.)

Upon appeal of the District Court's order granting summary judgment the Appeals Court, upon review of the record of the District Court, must determine whether the District Court erred and there is in fact a genuine issue of material fact underlying the summary judgment and, if not, whether the substantive law was correctly applied. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *United States v. Bissett-Berman Corp.*, 481 F.2d 764 (C.A. 9th, 1973); *United States Steel Corp. v. Darby*, 516 F.2d 961 (C.A. 5th, 1975). On each of the four issues upon which the District Court granted summary judgment, Defendant argues that Plaintiff did not respond as required by the rules of procedure, FRCP Rule 56(e), and did not set forth to the District Court specific facts evidencing the existence of a genuine issue for trial, and that further, there are in fact no material factual issues in dispute and the District Court correctly applied the applicable law.

(A) *Regulatory Taking*

Substantive law warrants the rendering of summary judgment for Defendant on the issue of a regulatory taking. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the Supreme Court held that a just compensation claim based upon an alleged regulatory taking is not ripe for adjudication in the federal court until 1) plaintiff has sought and received a final decision by the governmental entity charged with implementing the zoning regulation regarding the application of the regulations to the specific property in issue, 473 U.S. at 186, and 2) plaintiff has sought and been denied compensation through State procedures, 473 U.S. at 194. The requirement of a final decision is reasoned by the Court as essential to its evaluation of the economic impact of the challenged regulations and the extent to which it interferes with the reasonable investment-backed expectations of plaintiff. 473 U.S. at 191. The requirement of a final decision also dispels any potential for an administrative resolution through proceedings for variance or waiver. 473 U.S. at 187. To be ripe for federal court adjudication the Court must first have a final definitive determination of the administrative agency which applies the challenged regulations to the property in question. The decision has been reaffirmed in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285, *reh'g denied* _____ U.S. _____, 107 S. Ct. 22, 92 L. Ed. 2d 773 (1986), and in the recent Ninth Circuit decision of *Kinzli v. City of Santa Clara*, 818 F.2d 1499 (9th Cir., 1987).

Under *Hamilton Bank*, a final and authoritative determination requires not only that plaintiff submitted a development plan which was rejected, but also that plaintiff sought variances or waivers which would permit uses not allowed under the regulations. 473 U.S. at 188. In *Yolo County, supra*, the Court noted that land use planning is not an all or nothing proposition, a denial of a desired plan does not equate to a refusal to permit any development on the property. 91 L. Ed. 2d at 293. The refusal to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. 91 L. Ed. 2d at 293. As stated by the Court at footnote 9, 91 L. Ed. 2d at 297, the "rejection of exceedingly grandiose development plans does not

logically imply that less ambitious plans will receive similar unfavorable reviews."

Defendant argues that under the rule of *Hamilton Bank*, Plaintiff's claim based upon the downzoning of Plaintiff's property, of a regulatory taking requiring just compensation under the Fifth Amendment of the United States Constitution (and made applicable to the states under the Fourteenth Amendment of the United States Constitution), was premature based upon Plaintiff's pleadings and the numerous exhibits attached thereto. The District Court had no evidence of, nor did Plaintiff even allege that Plaintiff had submitted a development plan for the property which had been rejected, nor that Plaintiff had sought a perhaps less desired but permissible development plan for approval, nor that Plaintiff had sought any variances or waivers from the application of the zoning regulations. In support of its motion, however, Defendant submitted the Affidavit of Loretta Chee attesting to the fact that a search of the records of both the Zoning Adjustments Branch, which processes applications for variances from the zoning ordinance, and of the Zoning District Changes Branch, which is responsible for the rezoning of land as required by the development plans, and over which the Affiant has supervisory responsibilities, revealed no record of Plaintiff having sought any zoning variance for the subject property from December 23, 1982, when the downzoning to "P-1" preservation was effected by Ordinance No. 82-62, through June 18, 1987. Under *Hamilton Bank*, Plaintiff must show he had sought variances or waivers which would permit uses not allowed under the challenged regulations, otherwise *Hamilton Bank* holds that the claim of regulatory taking must be dismissed as not ripe for adjudication in the federal court.

Defendant accordingly argues that the District Court correctly ruled that there was no genuine issue of material fact and correctly applied the rule of law in determining that Plaintiff's claim for just compensation based upon an alleged regulatory taking was not ripe for federal court adjudication.

(B) *Infringement Of Contractual Rights*

Plaintiff alleged in this action that Plaintiff's deed to the subject property originating from the deed transaction recorded on November 4, 1949 from Thomas Young Yoon to Kam Tai Lee of the

several parcels of the Sunset View Lots tract, constituted a contractual relationship between Plaintiff's predecessor in title and Defendant, of the "AA" residential district zoning for the real property established by Resolution No. 81 of the Board of Supervisors of the City and County of Honolulu on November 24, 1942. Plaintiff contended that the contractual rights inured to Plaintiff by virtue of Plaintiff's purchase of the property and execution of the deed, and payment of real property taxes assessed against the residentially zoned property. Plaintiff acquired the property in 1963.

Plaintiff alleged that the downzoning of the property through adoption of the Development Plan for the Primary Urban Center, Ordinance No. 81-79, and Zoning Map No. 7, Ordinance No. 82-62, violated Plaintiff's constitutional right against infringement of contractual rights and also violated the provisions of HRS Section 46-4. In response, Defendant argues and the District Court so ruled that as a matter of law, Plaintiff had no contractual rights in the perpetuation of the "AA" residential district zoning existing at the time of Plaintiff's acquisition of the property in 1963, nor in 1949 at the time title was acquired by Plaintiff's predecessor in title, nor does HRS Section 46-4 mandate the perpetuation of the zoning designation existing at the time of its enactment in 1957.

The enactment of the zoning resolution in 1942 did not give Plaintiff any right to the perpetuation of the residential zoning set forth therein. As was stated in *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968) at 330:

> The enactment of a zoning ordinance is not a contract with the property owners of the city and confers upon them no vested right to have the ordinance remain forever in force, or to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance. Such legislation by the city may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public, subject only to the limitations of the enabling statute and the above mentioned limitations of the Constitution. (Citations omitted.)

Nor did Plaintiff's purchase of the property in 1963, which was

subject to an "AA" residential district zoning, create a right to rely on the perpetuation of the zoning. *Town of Largo v. Imperial Homes Corporation*, 309 So. 2d 571, 573 (Fla. App., 1975); *see also Eggebeen v. Sonnenburg*, 239 Wis. 213, 1 N.W.2d 84 (1941). The zoning regulation established for the subject property was not a contract by the Defendant and the zoning was subject to subsequent modification by Defendant. *Reichelderfer v. Quinn*, 287 U.S. 315, 323, 53 S. Ct. 177, 77 L. Ed. 331 (1932).

With respect to HRS Section 46-4 (*see* Appendix A at 1a), which grants the power of zoning to the various counties in the State of Hawaii, the only restrictions set forth therein worthy of discussion here are in subsection (a) and state as follows:

> This section and any ordinances or rules and regulations adopted in accordance with it, shall apply only to those lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.
>
> . . . .
>
> Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The subject property is not within a forest reserve boundary and there was no allegation by Plaintiff that the property is so situated. Accordingly, though the first clause quoted hereinbefore does restrict Defendant's zoning power, it is not at issue with regard to Plaintiff's property.

The second above-quoted clause of HRS Section 46-4 does not prohibit Defendant from subsequently rezoning lands from designations existing prior to July 1, 1957. The language is clear and there can be no doubt as to its proper construction.

There were no factual disputes presented to the District Court on the issue of infringement of contractual rights. The only matter resting with the Court on this issue was one of law, and Defendant argues that the District Court correctly applied the law to the facts herein, finding as a matter of law, that there was no contrac-

tual relationship between the parties which afforded Plaintiff the right to the continued residential zoning of the subject property.

(C) *Procedural Due Process*

Defendant provided published notification of its intent to adopt Ordinance Nos. 81-79 and 82-62. Ordinance No. 81-79 adopted the Development Plan for the Primary Urban Center, in which the subject property is situated, and Ordinance No. 82-62 adopted Zoning Map No. 7, which established the zoning which implemented portions of the said Development Plan for the Primary Urban Center.

In enacting these ordinances and adopting the Development Plan and Zoning Map No. 7, Defendant has acted in a legislative capacity and not an administrative capacity. These land use regulations constitute general statements of Defendant's policies, rather than specific applications of policy to a particular property owner, and they can only therefore be characterized as legislative acts. *Rogin v. Bensalem Township,* 616 F.2d 680, 693 (3rd Cir., 1980); *Eastlake v. Forest City Enterprises,* 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).

The distinction between legislative and administrative action is based on the theory that the relatively large numbers affected by the legislative action provide limitations on unreasonable governmental action, in contrast to administrative acts which affect only one or a few individuals. *Rogin, supra,* at 616 F.2d 693. As legislative acts, Defendant argued and the District Court so ruled that Plaintiff is not afforded the constitutional right of procedural due process of having a direct voice in the adoption of these land use regulations. *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915).

Where the action is legislative, personal notice is not required by the Constitution, and the Ninth Circuit has ruled as a matter of law that the enactment of a general zoning ordinance, such as Defendant's Zoning Map No. 7, Ordinance No. 82-62, is a legislative act. *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir., 1982).

Plaintiff also cites HRS Section 101-20, Notice; Eminent Domain (*see* Appendix A at 5a), as authority for the argument that Plaintiff is entitled to personal notification of Defendant's consideration of the adoption of these land use regulations. Initially Defendant

notes that Plaintiff failed to cite this statutory reference to the District Court in either Plaintiff's memorandum in response to or at the hearing on Defendant's motion for summary judgment and for dismissal of complaint. The statutory reference and Plaintiff's reliance thereon are therefore not a part of the record below and Defendant argues against the propriety of Plaintiff raising the matter for the first time on appeal. *Adickes v. S. H. Kress & Co., supra,* at 398 U.S. 157. Notwithstanding however, Defendant argues that the section is inapplicable hereto and it provides no legal basis for Plaintiff's claim of entitlement to personal notice. HRS Section 101-20 appears as a part of HRS Chapter 101 addressing Eminent Domain, and the language of the section clearly evidences its inapplicability hereto. HRS Section 101-20 states in part as follows:

> When the owner or claimant of the land sought to be *condemned* is known, *the summons* shall be served by delivering to the owner or claimant, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's *complaint.* (Emphasis added.)

As a matter of law, Defendant argues that this statutory provision addresses condemnation actions initiated in court by complaint, and has no applicability to the case herein. No allegation has ever been made that Defendant had filed a condemnation action against Plaintiff for the subject property.

As a matter of law, the constitution does not guarantee personal notice to Plaintiff by Defendant of the Defendant's consideration of the adoption of the land use regulations embodied in Ordinance Nos. 81-79 and 82-62. Accordingly, Defendant contends the District Court correctly applied the applicable law, and even upon consideration of HRS Section 101-20, summary judgment was warranted on this issue, there further being no factual disputes at all.

(D) *Conspiracy*

Plaintiff contended that Plaintiff's property was subject to downzoning to depress the value of the property to Defendant's benefit for future acquisition as a sewage facility. Defendant rebutted this

contention on the ground that the process resulting in the adoption of the Development Plan for the Primary Urban Center, Ordinance No. 81-79, and Zoning Map No. 7, Ordinance No. 82-62, did not consider the property as a future sewage facility. In support thereof, Defendant submitted the Affidavits of Raymond Yamashita and James Honke.

Revised Charter of the City and County of Honolulu 1973 (1984 Ed.) ("RCH") Sections 5-408 and 5-409 describe the General Plan and the Development Plans, respectively. (*See* Appendix B at 6a.) RCH Section 5-408 provides in part that the General Plan shall "set forth the city's broad policies for the long range development of the city." RCH Section 5-409 provides in part that the development plans be "relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city."

In recommending the redesignation of the subject property to preservation in the Development Plan, Mr. Yamashita by affidavit stated that consideration was made to 1) the population guidelines existing in the General Plan for the Primary Urban Center, 2) the existing residential designation of the property, 3) the lack of improvements on the property, and 4) the steep slope of the property. Mr. Yamashita reviewed planned public facilities for the Primary Urban Center in preparing the Development Plan therefor, and stated that the property was not planned for a public facility nor specifically a sewer facility and that his recommendation for redesignation of the property to preservation was not based upon any knowledge of a planned sewer facility on the property.

The subsequent adoption of Zoning Map No. 7, Ordinance No. 82-62, which affected the land use designation for the Halawa to Pearl City portion of the area embodied in the Development Plan for the Primary Urban Center, is mandated by Defendant's Charter, RCH Section 6-906 (Appendix B at 7a), which provides in part that the Council shall "enact zoning ordinances which shall contain the necessary provisions to carry out the purpose of the general plan and development plans."

The downzoning of which Plaintiff complains originated with the adoption of the Development Plan for the Primary Urban Center, Ordinance No. 81-79, on November 25, 1981, which designated the parcel as preservation. The Affidavits of Raymond Yamashita

and James Honke established that at the time of the preparation of the Development Plan, *i.e.*, prior to November 1981, the parcel was not "master planned" for a sewer facility and was not considered as a future public facility site by Mr. Yamashita in his recommendation of the parcel for the preservation designation.

Plaintiff provided the District Court with no evidence of a conspiracy nor any Affidavits to rebut the statements set forth in the Affidavits submitted by Defendant. Under FRCP Rule 56(e), Defendant argues that Plaintiff was mandated to set forth specific facts evidencing a genuine issue for trial, and in the absence of any disputed factual issues, summary judgment in Defendant's favor was fully warranted on this issue.

In Plaintiff's Brief, Plaintiff cites Ordinance No. 86-96 as support for Plaintiff's claim of a conspiracy. Initially Ordinance No. 86-66 was argued by Plaintiff and is the Defendant's Executive Capital Budget Appropriation Ordinance for the Fiscal Year July 1, 1986 to June 30, 1987. Defendant again argued against the propriety of Plaintiff raising this ordinance citation for the first time on appeal. *Adickes v. S. H. Kress & Co., supra,* at 398 U.S. 157. Plaintiff failed to cite this ordinance to the District Court in either Plaintiff's memorandum in response to or at the hearing on Defendant's motion for summary judgment and for dismissal of complaint. The ordinance reference and Plaintiff's reliance thereon are not a part of the record below. Notwithstanding, Defendant now argues that said Ordinance No. 86-96 fails to raise any issue of material fact and the ruling of the District Court granting summary judgment on the issue of conspiracy is not thereby called into question.

Ordinance No. 86-66 evidences that it was first introduced as a bill to the Council of the City and County of Honolulu on March 5, 1986. The Affidavit of Raymond Yamashita established that in 1979 he was already working on the Development Plan for the Primary Urban Center, which was ultimately adopted as Ordinance No. 81-79 on November 25, 1981. Obviously the actions effected by the adoption of Ordinance No. 81-79 were based upon decisions on facts existing much earlier in time. Although Ordinance No. 86-66 was not cited to the District Court by Plaintiff, even if the Court had considered the legislation, Defendant submits that the appropriation for the planning and design of a sewer system in 1986 does not raise an issue of fact of a conspiracy in

1979, 1980 or 1981. The Affidavit of James Honke established that a sewer pump station was not site designated for any of said years. The Affidavit of Raymond Yamashita established that his recommendation for redesignation of the property was not based upon the existence of any plans for a public facility on the site.

Based upon Plaintiff's failure to submit any evidence to the District Court giving rise to a disputed factual issue, and even upon consideration of Ordinance No. 86-66, Defendant contends that the Court's rendering of summary judgment on the issue of conspiracy was fully warranted under the circumstances.

B. The District Court Did Not Err In Dismissing The Complaint Upon The Determination That All Of The Issues In The Suit Had Been Adjudicated By Summary Judgment.

The District Court's order granting summary judgment addressed four issues, being (1) regulatory taking, (2) infringement of contractual rights, (3) procedural due process, and (4) conspiracy. It appears from Plaintiff's Notice of Appeal filed in the District Court and Plaintiff's Opening Brief, that Plaintiff is raising a claim of the violation of the constitutional guarantee against ex post facto laws. In response, Defendant argues that Defendant is entitled to rely upon Plaintiff's Complaint as setting forth the claims of the lawsuit of Plaintiff against Defendant. *Franklin v. Zuber*, 56 F.R.D. 601 (S.D.N.Y., 1972); *Wong v. Bacon*, 445 F. Supp. 1177 (N.D. Cal., 1977); FRCP 8(a). A reading of Plaintiff's Complaint in the District Court discloses no allegation of a violation of the guarantee against ex post facto laws. Though Plaintiff appeared pro se in the District Court proceeding, he should be held to the same rules of evidence and procedure as those qualified to practice law. *Hutter Northern Trust v. Door County Chamber of Commerce*, 467 F.2d 1075 (7th Cir., 1972). Even a pro se complaint is subject to dismissal if the pleading fails reasonably to inform Defendant of the asserted cause of action. *Brown v. Califano*, 75 F.R.D. 497 (D.D.C., 1977); which also recognized that courts have unhesitatingly dismissed actions where the complaint was "confusing, ambiguous, redundant, vague, and in some respects, unintelligible." 75 F.R.D. at 499.

At the hearing on Defendant's Motion for Summary Judgment and Dismissal of the Complaint, Defendant stated its position that

it believed said motion was dispositive of all of the issues of Plaintiff's Complaint. The District Court made several inquiries of Plaintiff for a concise enumeration of Plaintiff's claims remaining before the Court, following the Court's receipt of the two stipulations withdrawing claims. Following the Court's third inquiry of Plaintiff of what claims remain in his lawsuit, Plaintiff responded, "the right to notice under due process, the Amendment Fourteen of the Constitution, the right to security under obligation to contracts in Article 1, Section 10 of the Constitution, and the right to ex post facto law, in that one need not be diminished by law in Article 1, Section 9 and Section 10 of the Constitution." In argument, Plaintiff's ex post facto claim appeared to resolve into a claim of the violation of the guarantee against infringement of contracts.

The hearing on Defendant's Motion for Summary Judgment and Dismissal of Complaint was held on September 8, 1987. The trial before the District Court was scheduled to commence on September 9, 1987. Plaintiff alleged that the ordinances zoning the subject property are ex post facto laws, being Ordinance Nos. 3234, 81-79, 82-62 and 86-96. Initially Defendant notes that Ordinance No. 81-79 is the Development Plan for the Primary Urban Center, and it designated the subject parcel "preservation." No zoning change was effected by the adoption of the Development Plan. RCH §5-409; *see* Appendix B at 6a. Plaintiff is in error in alleging a downzoning of the property by virtue of Ordinance No. 81-79. Secondly, the constitutional guarantee against ex post facto laws applies only to criminal statutes and forbids the application of new punitive measures to a crime already consummated. *Calder v. Bull*, 3 U.S. 385 (1798); *Lindsey v. Washington*, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).

The subject parcel is vacant unimproved land. Plaintiff has never alleged that the use of the land is in violation of any of Defendant's prior or current zoning ordinances, and there is therefore no allegation of the application of new provisions to an act already consummated. Assuming further, however, for the sake of argument, that the use of the land was in violation of the provisions of Ordinance No. 3234, the Comprehensive Zoning Code, at the time of its effective date in 1969, or the provisions of Ordinance No. 86-96, the Land Use Ordinance, effective in 1986, both said ordinances specifically provide for the maintenance of uses

existing at the time of the effective date of each said ordinance, as legally nonconforming uses. It is clear, as a matter of law, that Ordinance Nos. 3234 and 86-96 do not invalidate a previously existing use. As such, even if the use of the subject land was prohibited upon the enactment of Ordinance Nos. 3234 or 86-96, neither of said ordinances would allow citation of the property as an illegal use, by virtue of the provisions existing therein for legally nonconforming uses. Accordingly, Defendant argued that there can be no credible argument or facts elicited which would support Plaintiff's claim of an ex post facto law with respect to Ordinance No. 3234 or No. 86-96.

Ordinance No. 82-62 is Zoning Map No. 7 which rezoned the subject parcel from "R-3" residential to "P-1" preservation, effective December 1982. While the ordinance changed the zoning of the subject parcel, the provisions of Ordinance No. 3234, the Comprehensive Zoning Code, continued in effect, first directing the uses permitted for "R-3" residential zoning on the property and then for the "P-1" preservation zoning. The provisions for nonconforming uses in Ordinance No. 3234 continued as well, notwithstanding the adoption of Ordinance No. 82-62, so that even with the downzoning of the subject property effected by Ordinance No. 82-62, Plaintiff would be free to continue the use of the land existing immediately prior to the downzoning, as a legally nonconforming use. Therefore, there can be no credible argument or facts which would support Plaintiff's claim that Ordinance No. 82-62 is an ex post facto law.

III.

THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT FOR THE CITY ON THE ISSUES OF (1) REGULATORY TAKING, (2) PROCEDURAL DUE PROCESS, (3) INFRINGEMENT OF CONTRACTUAL RIGHTS, AND (4) CONSPIRACY

A. Regulatory Taking.

This Court has made it clear that a regulatory "taking" claim is not ripe for adjudication unless the claimant has first obtained a final decision regarding the application of the zoning ordinance to the subject property and has utilized the existing state procedures to obtain compensation. *See generally MacDonald, Sommer & Frates v. County of Yolo, supra; Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra.* In this case the Ninth Circuit Court of Appeals ruled that the Toda claim was not ripe for adjudication since Mr. Toda failed to seek State remedies. A review of this Court's decisions indicate that the Ninth Circuit's decision is correct.

In *Hamilton Bank* this Court held that in order for a "taking" claim to be ripe for adjudication, the plaintiff must show that a "final" decision regarding the use and development of the property in question has been rendered and that the plaintiff has no adequate state remedy. The Ninth Circuit, in dismissing the Toda claim, found that Mr. Toda had not availed himself of the available State remedies or shown that the State procedures were not available or inadequate. In this regard, the Ninth Circuit placed the burden on Mr. Toda to show the unavailability or inadequacy of the State remedies. This position is consistent with this Court's determination in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra.*

B. Procedural Due Process.

Plaintiff claimed that he was denied procedural due process because Defendant did not inform him of its zoning changes. This circuit has ruled that the enactment of a general zoning ordinance

is a legislative act, *Kuzinich v. County of Santa Clara, supra,* which does not require procedural due process to anyone affected by it. *Texaco v. Short,* 454 U.S. 516, 531-38 (1982); *O'Neill v. Town of Nantucket,* 711 F.2d 469, 471 (1st Cir., 1983). Therefore, the Ninth Circuit properly found that the zoning ordinances about which Plaintiff complains need not have been preceded by notice to the landowners concerning their implementation.

C. **Infringement of Contractual Rights.**

Plaintiff also argued that his purchase of the property and his payment of property taxes vested in him the right to retain the property, zoned as it was when he first purchased it. The zoning regulations established on Plaintiff's property do not constitute a contract between Honolulu and Toda. Therefore, the zoning remained subject to modification. *See generally Texaco,* 454 U.S. at 532-33.

Therefore, the Ninth Circuit was correct when it held that no constitutional violation of contract had occurred as a result of Honolulu's zoning regulations.

D. **Conspiracy Charges.**

Plaintiff contended that Defendant conspired to downzone his property so that it could later acquire his property at a reduced value for its use as a sewage facility. Defendant submitted the Affidavits of personnel in charge of sewage station development, Yamashita and Honke, stating that they had no knowledge that Honolulu planned on using Toda's property as a sewage pump station. According to Fed. R. Civ. P. 56(e), Plaintiff was required to set forth specific facts in light of these Affidavits. His failure to do so allowed summary judgment on this issue.

E. **Ex Post Facto.**

Finally, Plaintiff presents a new argument on appeal that the zoning laws violated the Constitution in that they were *ex post facto.* The Ninth Circuit Court did hear the claim and held that *ex post facto* laws only prohibit the application of new punitive mea-

sures to a consummated crime. *Lindsey v. Washington, supra* at 402. The court held it was not presented with an *ex post facto* claim involving a crime.

CONCLUSION

The Ninth Circuit properly affirmed the District Court's Order Granting Summary Judgment on the issues of (1) regulatory taking, (2) infringement of contractual rights, (3) procedural due process, and (4) conspiracy on the grounds that the District Court correctly determined that there was no genuine issue of any material fact and that the substantive law was correctly applied.

As this Court has consistently held with regard to the regulatory taking claim, if a claim is not ripe for adjudication, the Court lacks jurisdiction in the case. The Ninth Circuit properly held that Mr. Toda's claims for regulatory taking were not ripe for adjudication since he had not shown that the State remedies were inadequate or unavailable. Lastly, Mr. Toda should not be permitted to avoid the established procedures available in Hawaii and the City Charter to obtain the relief he is seeking. The City therefore respectfully requests this Court to deny the Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, July 25, 1989.

Respectfully submitted,

DONNA M. WOO
Counsel of Record
MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel
Attorneys for Respondent
City and County of Honolulu

APPENDIX

APPENDIX A

Hawaii Revised Statutes (1985)

§46-4 County zoning. (a) This section and any ordinances or rules and regulations adopted in accordance with it, shall apply to those lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.

Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district as shall be deemed best suited to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land so as to allow and encourage the most beneficial use of the land consonant with good zoning practices. The zoning power granted herein shall be exercised by ordinance which may relate to:

(1) The areas within which agriculture, forestry, industry, trade, and business may be conducted.

(2) The areas in which residential uses may be regulated or prohibited.

(3) The areas bordering natural watercourses, channels, and streams, in which trades or industries, filling or dumping, erection of structures, and the location of buildings may be prohibited or restricted.

(4) The areas in which particular uses may be subjected to special restrictions.

(5) The location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered.

(6) The location, height, bulk, number of stories, and size of buildings and other structures.

(7) The location of roads, schools, and recreation areas.

(8) Building setback lines and future street lines.

(9) The density and distribution of population.

(10) The percentage of lot which may be occupied, size of yards, courts, and other open spaces.

(11) Minimum and maximum lot sizes.

(12) Other such regulations as may be deemed by the boards or city council as necessary and proper to permit and encourage orderly development of land resources within their jurisdictions.

The council of any county shall prescribe such rules and regulations and administrative procedures and provide such personnel as it may deem necessary for the enforcement of this section and any ordinance enacted in accordance therewith. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

Any civil fine or penalty provided by ordinance under this section may be imposed by the district court, or by the zoning agency after an opportunity for a hearing, pursuant to chapter 91. Such a proceeding shall not be a prerequisite for any injunctive relief ordered by the circuit court.

Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in

accord with a long range, comprehensive, general plan, and to insure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers now possessed by any county to achieve the ends through zoning and building regulations, except insofar as forest and water reserve zones are concerned and as provided in subsections (c) and (d).

Neither this section nor any ordinance enacted under this section shall prohibit the continuance of the lawful use of any building or premises for any trade, industry, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single family or duplex) or agricultural uses. Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262.

(b) Any final order of a zoning agency established under this section may be appealed to the circuit court of the circuit in which the land in question is found. The appeal shall be in accord with the Hawaii rules of civil procedure.

(c) Each county shall adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted; provided:

(1) All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking, and floor area requirements;

(2) The county determines that public facilities are adequate to service the additional dwelling units permitted by this subsection; and

(3) Construction of the second dwelling is otherwise in accordance with applicable zoning ordinances and rules, and general plan and development plan policies.

Nothing in this section shall supersede any recorded covenant or deed restriction that prohibits the construction of a second dwelling on a lot.

After receiving notice that a permit has been granted pursuant to this subsection, the applicant, once a week, for two consecutive weeks, shall publish a notice in a newspaper of general circulation in the area stating the applicant's name and address of the property, and notifying the public that the permit has been obtained. No construction shall be initiated until the last of the notices has been published. If the applicant fails to publish the notices, and constructs the unit, and a covenant or deed restriction exists that would have precluded the construction of the second unit, any person or entity who successfully brings an action for violation of the covenant or deed restriction shall be entitled to reasonable attorney's fees and costs.

This subsection shall not apply to lots developed under planned unit development, cluster development, or similar provisions which allow the aggregate number of dwelling units for the development to exceed the density otherwise allowed in the zoning district.

Each county shall establish a review and permit procedure necessary for the purposes of this subsection.

(d) Neither this section nor any other law, county ordinance, or rule shall prohibit group living in facilities with eight or fewer residents and which are licensed by the State as provided for under section 321-15.6 or in intermediate care facilities for the mental retardation (ICF/MR-C) for persons, including the mentally ill, the elderly, the handicapped, the developmentally disabled, or the totally disabled persons, who are not related to the home operator or facility staff; provided that such group living facilities meet all applicable county requirements, not inconsistent with the intent of this subsection and including building height, setback, maximum lot coverage, parking, and floor area requirements. For purposes of this section, "mentally ill person" means a

mentally ill person as defined under section 334-1; "elderly person" means an elderly person as defined under section 201E-230; "handicapped person" means an individual with a physical handicap as defined under section 515-2; "developmentally disabled person" means a person suffering from developmental disabilities as defined under section 333E-2; "totally disabled person" means a person totally disabled as defined under section 235-1; and "intermediate care facility/mental retardation-community (ICF/MR-C)" is defined as an identifiable unit providing residence and care for eight or fewer mentally retarded individuals. Its primary purpose is the provision of health, social and rehabilitation services to the mentally retarded through an individually designed active treatment program for each resident. No person who is predominately confined to bed shall be admitted as a resident of such a facility.

§101-20 Notice. When the owner or claimant of the land sought to be condemned is known, the summons shall be served by delivering to the owner or claimant, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's complaint. If the owner or claimant, although known, was never a resident of the State or has removed therefrom or cannot for any reason be served with process within the State, or if the owner or claimant is unknown, then the service of the summons upon the owner or claimant may be made in the manner provided by sections 634-23, 634-24, and 634-26. If the defendants are joined in the complaint by describing them as a class, then the service of the summons upon the defendants may be made by publication in a newspaper of general circulation in the county in which the property is situated, in the manner provided by sections 634-23(3) and 634-26, and by giving such further notice as the court may order. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case.

APPENDIX B

Revised Charter of the City and County of Honolulu 1973 (1984 Ed.)

Section 5-408. General Plan — The general plan shall set forth the city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, State or federal. The statements shall include, but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

Section 5-409. Development Plans — "Development plans" mean relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city. A development plan shall include a map of the area of the city to which it is applicable; shall contain statements of standards and principles with respect to land uses within the area for residential, recreational, agricultural, commercial, industrial, institutional, open spaces and other purposes and statements of urban design principles and controls; and shall identify areas, sites and structures of historical, archaeological, architectural or scenic significance, a system of public thoroughfares, highways and streets, and the location, relocation and improvement of public buildings, public or private facilities for utilities, terminals and drainage. It shall state the desirable sequence for development and other purposes as may be important and consistent with the orderly implementation of the general plan.

Development plans may contain statements identifying the present conditions and major problems relating to development, physical deterioration and the location of land uses and the social, economic and environmental effects thereof; may show the projected nature and rate of change in present conditions for the rea-

sonably foreseeable future based on a projection of current trends; and may forecast the probable social, economic and environmental consequences of such changes.

Section 6-906. Zoning Ordinances — The council shall, after public hearings, enact zoning ordinances which shall contain the necessary provisions to carry out the purpose of the general plan and development plans. In enacting the ordinances, the council shall take into consideration the character of the several parts of the city and their peculiar suitability for particular uses and types of development with a view to encouraging the most appropriate use of land throughout the city. The ordinances shall contain reasonable standards with respect to the location, height, bulk, size of buildings and other structures, the area of yards, courts, off-street parking spaces and facilities and other open spaces, the density of population, and the use of buildings, structures and land for trade, industry, business, residence or other purposes.

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
AUG 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2141

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HARVEY H. TODA,

Petitioner,

CITY AND COUNTY OF HONOLULU

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals

FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

HARVEY H. TODA, pro se
1363 Hoowali Street
Pearl City, Hawaii
96782
Telephone: (808) 456-1328

QUESTIONS PRESENTED FOR REVIEW

A PREJUDGMENT of the case occurred and an oral argument requested en banc was turned down, by the Ninth Circuit Court of Appeals.

CONSPIRACY in TORT is the reason for this case as explained to Court in the first de-novo case wherein the Summary Judgment was DENIED.

The request for a TRIAL, TRIAL BY JURY, was submitted for this case.

Upon a request for a DEPOSITION by the City, it was completed. The City Attorney stated that if he was to admit that the sub-allegations were true, would I sign-off the suit?

I stated I would, and, the following statements were made: That, DUE PROCESS OF LAWS, INFRINGEMENT OF CONTRACTUAL RIGHTS, PROCEDURAL DUE PROCESS, EX POST FACTO violation, Violation of the Initia-

tive "Notification" Ord. 84-111, the injury to the family under Section 2-102 Purposes...., the Civil Rights Act violation under the Constitution, and CONSPIRACY under Criminal Law, were signed under an Agreed-Statement that no SUIT will follow in regards to the CONSPIRACY case under this number, but CONSPIRACY under TORT will continue. There were two separate cases that were signed. Because it was believed that everything is correct and Petitioner couldn't read too well, it were signed. (Now, with the cataract surgery, I can see better. 1988) When the 2nd de-novo case came up, the Court asked if I had signed the papers. I stated, "Yes, I did" and it was affirmed that a SUMMARY JUDGMENT now existed.

It is still believed that CONSPIRACY in the TORT sense, is to be adjudicated.

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No. 88-2141

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HARVEY H. TODA, pro se

Petitioner,

CITY AND COUNTY OF HONOLULU,

a Municipal Corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

This is an appeal by Plaintiff from the Ninth Circuit's affirmation of the Court's Order Granting Motion for Summary Judgment.

This is Lot 1 of 56 lots with a 40 feet driveway submitted under "Sunset View Lots"tract as situated on Welelau Place, Aiea Heights, State of Hawaii, and containing an area of 203,844 square feet. Though the agricultural zone was promised "AA" residential by Resolution 81 of the City and County of Honolulu, Board of Supervisors(a Territory then) in 1942, it was accepted and filed as "AA" residential in 1949, as Sunset View Lots and kept as residential till 1982. In 1969, Ordinance 3234 Comprehensive Zoning Code grandfathered Sunset View Lots from "AA" residential to "R-3" residential, and it now became a misdemeanor, outlawing clause negated. In 1978, Prosecutor of the Tax Appeal Court stated with Resolution 81 that the property was still R-3 residential, and an AGREED STATEMENT closed the case of 1798.

In the Respondent's Brief in Opposition, in the APPENDIX A on page 1a, the ENABLING ACT of the Hawaii Revised Statutes (1985) under Section 46-4 COUNTY ZONING.(a), the fifth paragraph PROVIDES:

> "Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957."

Thus, it is believed that CONTRACTS RIGHT existed in that, in creating Ord. 81-79, it was necessary to notify owner of the possible changes--but it was never done, and Ord. 81-79 became Law in contradiction to Ord. 3234 of 1969. Since the owner was never notified, then Ord. 82-62 with OWNERSHIP NOTED, avoided NOTIFICATION by LAW, under Section 101-20 Notice, HRS; (see page 5a of Appendix A of Brief in opposition) painted out residential to preservation and gave a newspaper notification as a LEGISLATIVE ACT ONLY. This

case negated lot 1 from residential to preservation but CONTINUED ON IN CODE 1 designation of real property VALUATIONS till June 30, 1983. NO ONE NOTIFIED THE OWNERS, and TAXES WERE PAID. The City had RIGHTS to REFUND this Overtaxation, but they did not. (The City claims they had too much work to do, and could not do this refunding, in 1-29-88)

On the next VALUATIONS from July 1, 1983 till June 30, 1984, the SAME TAXES FOR RESIDENTIAL WAS PAID. Now, the Code 1 indicated Code 8 for preservation, but TAXES REMAIND THE SAME FOR RESIDENTIAL. The Appeal Date of April 9, 1983 was passed. The Municipal Rights allowed "compromise" under the City's Law but it was never extended, even when asked for same.

PERMIT DENIED. About mid-October 1983, upon request for a Permit to build a house, the Land Use office stated that

the land was PRESERVATION and no house could be built onto same.

The Assessor was questioned but he failed to give any reason other than to do his work over and over as before.

On 4-9-84, an appeal submitted to the Board of Review corrected from July 1, 1984 to June 30, 1985 from the old VALUATION of $93,106 to New VALUATION of $28,078; and it was taxed annually for $189.53.

The irrelevant necessity to change the zoning may have taken place but, it was an application to the Department of General Planning to cut the TAXES down for down-zoning the land.

The land was up-zoned partially by the City Council. The Assessor then, raised the TAXES too high, and without the exemptions as given by law, nor in the incomplete water-easement of lot 1.

Ordinance 86-96 was on public sale from October 22, 1986, and within 30 days this CONSPIRACY case was initiated under DC CV 86-1069.

The Summary Judgment case through the U.S. Court of Appeals of the Ninth Circuit is Case #87-2820.

It is now under a Writ of Certiorari with the U.S. Supreme Court case 88-2141.

DISCOVERY: For the year July 1, 1987 to June 30, 1988, a TAX COURT CASE #2485 was initiated that, the partial R-10 residential VALUATION with P-2 preservation VALUATION, totally was $213,664 and the Court cut it down to $89,586 for Jan. 1, 1987. The 15% deduction for water-easement and 50% deduction for "NO PASS ZONE" was included. Municipal Law violations of MARKED deductions and INCOMPLETED municipal Law violations was not included. The Award did not give any deductions for the Government exemptions. It had gone to the Hawaii Supreme Court for 12975 but denied and thus it was applied to the U.S.District Court under 8900087 DAE for the Government exemptions and this unrefunded overtaxation. Under res judicarta this case is also under Summary Judgment. It is pending an appeal. The judgment AWARD shows it is too high.

CONSPIRACY: The Damage Suit includes the following:

1. Overtaxation as PAID, known by the government but unknown by Petitioner, is a part of the first conspiracy.

2. Overtaxation as PAID, known by the government code 8 involved but unknown by Petitioner, is the 2nd conspiracy.

3. Overtaxation as PAID, known by the government code 8 involved, now known by the Petitioner, is the 3rd conspiracy.

4. Overtaxation as PAID under 1, 2, 3, known by the government under Ord. 82-62 with Affidavit from Raymond Yamashita of disregarding steep slopes of land and also information from Mayor Eileen Anderson that the steep slopes of land was in violation of Ord. 81-79, that the preservation was made against residential zoning, though it violated Ord. 3234 and Ord. 81-79 as tie-in of Ord. 85-46, and as tie-in

under 86-133 of Exhibit 15 of Ord. 86-96.

Of 86-133 it carries under: Section III. Previous Unilateral Agreements

> All conditions of unilateral agreements adopted under previous zoning map amendments shall continue in full force, and shall not be affected by zone changes enacted by this ordinance.

This is the 4th conspiracy.

5. Overtaxation as PAID under 1, 2, 3, known by the government but failed to inform owners or Petitioner, violated the Constitutional Law under Amendment 14 of "due process" and "equalization" and in violation of the Hawaii Revised Law Sec. 101-20 Notify of failure to notify known persons excepting by news article only. This is the 5th conspiracy.

6. Discovery: Careful checks indicated that the Municipal Law was created under an Initiative. That, it was a cooperation, and it represented one-person.

Section 1-101 Incorporation, provides the City with perpetual succession.

Section 1-103 Structure of Government--

> The government provided by this charter shall consist of two coordinate branches to be known as the "Legislative Branch" and the "Executive Branch."

This is the 6th Conspiracy. The U.S. Constitution does not allow this.

7. Overtaxation as PAID under 1,2,3, failed to accept Art. 1 Sec. 10 "infringement of Contracts" as provisioned under Section 46-4 AMS; provisioned:

> "Nothing in this section shall invalidate any zoning ordinances or adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957."

This is the 7th Conspiracy.

8. After downzoning, we now have a picture of upzoning. It again troubles Petitioner in that prices are too high: From downzoning of residential to preservation, the same amount of taxes were

PAID. With an acre of land made residential, both residential and preservation discovered to be $213,664. Previously, with all residential of 4½ acres, it costs about a VALUATION of $93,000. With an appeal under Case 2485, the Assessor lowered it, the Attorney lowered it, and the Court lowered it further. However, the Court failed to complete the 4 reasons for jurisdiction, and the AWARD was extended to PETITIONER.

9. Over taxation as PAID under 1, 2, 3, violates a misdemeanor crime under Ord. 3234, by another misdemeanor crime under Ord. 86-96; of Art. 1 Section 10, "ex-post facto" violated by the State.

Dated: Honolulu, Hawaii, August 8, 1989.

Respectfully submitted,

Harvey H. Toda

Harvey H. Toda, pro se
1363 Hoowali Street
Pearl City, Hawaii 96782

APPENDIX

Lot 1 Sunset View Lots 9-9-19: 01

1. Thomas Y. Yoon (s/P) (T/C)
   (For 1949 fr 9-9-7-3) 203,844 s.f.

2. Kam Tai Lee (S/P)

3. Kam Tai Lee (S/P) D: 10/21/49 fr Yoon
   203,844sf $10. 11/4/49 Bk 2271/303
   203,844 s.f.

4. Irwin M. Chelf (m)

5. Covell C. Flesner (m) D: 3/10/51 fr
   Lee 203,844sf R.S.$9.90 3/19/51
   Bk 2442/88 (w/9-9-15-17) 203,844s.f.

6. Albert W. Lesser (m)

7. Alexander S. Farm & Wf Violet Chee
   (T/E) D: 2/9/59 fr Chelf etal
   203,844sf RS $16.50 3/9/59
   Bk 3579/370 203,844s.f.

8. Harvey H. Toda & wf Janet K (T/E)
   D: 8/13/63 fr Farm & wf 203,844sf
   RS $33.00 8/31/63 Bk 4578/542
   203,844 sf.

9. Harvey Haruyoshi Toda Trust 1/2 Int
   D-5/10/84 CT none 5/14/84
   Bk 17870/451(HHToda and JK Toda Trs)
   203,844s.f.

10. Janet Kichino Toda Trust 1/2 Int

Certified to be a true and correct
copy of the original on file in
this office.
S/S Richard Nathaniel
Assessor Real Property Assessment Sec.
Date: 1-24-89

SunPress April 3-9, 1986

By Curtis Lum Aiea Heights page 1

AIEA RESIDENTS PROTEST REST HOME ADDITION PLAN

A proposed expansion of the Aiea Heights Rest Home has drawn a flood of criticism from nearby residents, who claim that the addition will increase existing sewage and runoff problems.

Sammy and Remedios Sonson, owners of the rest home at 99-552 Aiea Heights Drive have filed for a conditional use permit with the city's Department of Land Utilization to expand its current operation from 28 beds to 62 beds.

In their application to the city, the owners proposed to build a two-story addition in the 42,523 square foot lot. They said that because the property is now used for a rest home, the addition "should not have any significant adverse impact on the adjacent property owners."

But some nearby residents disagree with the owners and claim that the addition, with a proposed paved parking lot, will have a negative affect on the neighborhood.

State Rep. Tom Okamura, D-41st District (Aiea-Halawa), said he has received many complaints from neighbors who expressed concerns about the expansion plan.

Okamura said he and City Councilman Arnold Morgado were to meet with the residents to hear their complaints and then present the concerns to the rest home owners on a later date.

Currently, there are no public sewer lines to the home, and an adjacent resident said the rest home's sewage has been overflowing from a cesspool for the past 14 years.

Nobuo Konno, who has lived next to the rest home since 1972, said he has

complained about the overflow since he moved there but the only solution offerred by the City was the occational pumping of the cesspool.

He said he is concerned that an increase in patients would put an added burden on the already overloaded sewage system.

Konno also told the Sun Press that during heavy rains, the water and mud from thehome's grounds washes onto his property. He said the plans to pave over a portion of a grass area for a 13-stall parking lot would increase the problem.

Lillian Malzman, the rest home's administrator, said the owners plan to deal with the sewage problem by digging new cesspools. She said this should meet the home's needs until a proposed City sewer line is installed in 1989.

Malzman said she is not sure how the flooding problem will be delt with, but she is sure the project's engineers are addressing the problem.

Konno said he is not satisfied that another cesspool will solve the problem because of the current cesspool's history of overflowing and the stench that it produces.

There are also questions whether there is a need to expand the current rest home.

Malzman said that although the home normally averages about five vacancies at any one time, she is certain there will be no problems filling the extra beds.

"People will be more anxious to go in a spanking new facility than an old one," she said of the 26 year-old home. Malzman added that the state Department of health has said there will be a need

for more beds during the next few years.

The new section's basement will contain nurses quarters and a kitchen, the application said. Proposed for the first floor are a dining/recreation room as well as bedrooms. Plans for the second floor call for a kitchen facility, a dining/recreation area, and nine bedrooms.

The date for a public hearing on the application has not been set, but a DLD spokesman said it should occur within the final two weeks of April.

SUN PRESS July 24 to 30, 1986

By DAVID WHITE, news Editor at Large
Pearl City PAGE 1

PEARL CITY COUPLE HOPES COUNCIL WILL RESTORE DREAM

Janet and Harvey Toda of Pearl City are hoping that the city will give them back at least a quarter of their dream for a comfortable retirement.

Twenty-three years ago, the Todas bought about 4½ acres of residentially zoned land at the end of Welelau Place in Aiea Heights.

And for the past 20-some-odd years the Todas did what good citizens are supposed to do. They scrimped and saved and somehow always managed to make the monthly mortgage payment until the loan was finally repaid.

They paid their property taxes on time, too.

Finally, ready to build their dream

retirement home, and perhaps subdivide their property to add to a comfortable nest egg, the Todas retained the services of a contractor to design the home.

It was at that point in late 1983 that Harvey Toda, when he went to City Hall to obtain a building permit, learned that his property had been "down-zoned" nearly a year earlier from residential to preservation use.

Toda got a fast lesson in Honolulu land use controls. He also learned about something called "development plans."

It seems city ordinance 81-79, approved Nov. 25, 1981, included his property in a "primary urban center development plan." The plan proposed that Toda's land be designated for preservation use.

A year later by Ordinance 82-62 signed into law by then Mayor Eileen Anderson on Dec. 23, 1982. Toda's pro-

perty was officially rezoned to preservation.

But while all of the rezoning was going on, no one bothered to tell Janet and Harvey Toda.

"While these two ordinances were being passed, nothing was mentioned to me that we were being tied in with this case," Harvey Toda said.

Toda began to ask around City Hall how the zoning on someone's property could be changed without the owners being told.

City officials told Toda that he should've kept abreast of the City's new "development plan" approach to land use by reading the newspaper.

"Maybe some(people) knew about all of this by reading the paper, but I didn't," Toda replied.

Being a trusting soula, Toda then

asked city bureaucrats what he could do to change things back to how they were.

Go to court and sue, if you think you have a chance was the response.

There was one more annoying surprise awaiting the Todas. Although their land was down-zoned in December 1982, they continued to be taxed at the much higher residential property rate until June 30, 1984.

"I told them (city tax collectors), "That's not fair. How could you down-zone my property and nobody told the tax division?"

The Answer? They told me it was my responsibility to appeal it," he said.

So Toda appealed his tax bill. And he won that battle--" he now pays a much lower tax bill on his preservation property. Now he's on the process of appealing the zoning, too.

The City Planning Commission voted last week to recommend to the City Council that at least one acre of Toda's 4.68-acre parcel be rezoned for residential use.

The council will probably vote on the matter later this year.

"I've been whistling all this time," Toda said. "If they can find a case to give me back one acre, maybe there's a case to give me back the whole thing back of course, if possible. But we just have to wait. Everybody asks me, "Why don't you go to Court and sue?"

"But, if I can do without that, fine. I don't even have an attorney yet, but they haven't turned me down yet. As soon as they turn me down, well, then I guess I would have reason to get an attorney."

One more thing bothers Toda. Since

1975 the city has made clear its intentions to construct a sewer line across his Aiea Heights property, and to build a sewer pump station on a small portion of it.

Toda said he can't help but wonder if his land was downzoned so that the city could avoid paying a higher price for that section of his property that will have to be condemned for the sewer project.

"I am 68 now, almost 69. I'm running out of time to build on that land, but maybe I can get enough of it back to give to my grandchildren."

"Going through all of this makes me wonder if I'll even see a house built there. Maybe my grandson will. I don't know about me."

STATEMENT OF RELATED CASES

Ordinance 84-111, notification of ownerships to owners, leasees, & others as co-owned, is now at the Hawaii Supreme Court for adjudication.

Pending decision.

Petitioner is not aware of other cases.

CERTIFICATE OF SERVICE

I, Harvey H. Toda, provides 3 copies of this report under 88-2141 a REPLY for the Writ of Certiorari, through the Sheriff's Office of the State of Hawaii, to:

CITY AND COUNTY OF HONOLULU
Richard D. Wurdeman
Corporation Counsel
Maria C. Avinante-Tanaka
Deputy Corporation Counsel
530 S.King & Punchbowl Sts.
Honolulu, Hawaii 96813
telephone: (808) 523-4704

Attorneys for Respondent

DATED: Honolulu, Hawaii, August 15, 1989.

Harvey H. Toda pro se
for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-2141

HARVEY M. TODA,

Petitioner,

V.

CITY AND COUNTY OF HONOLULU,

Respondent.

PROOF OF SERVICE

State of Hawaii)
) SS.
City and County of Honolulu)

Affiant, HARVEY M. TODA, after being duly sworn, disposes and says that pursuant to Court rules he served the within papers of REPLY BRIEF, to:

CITY AND COUNTY OF HONOLULU, a Municipal Corporation and James DOES, also a part of the Municipal Corporation.

Richard D. Wurdeman
Corporation Counsel
Maria C. Avinante-Tanaka
Deputy Corporation Counsel
Honolulu, Hawaii 96813

Attorneys for Respondent
City and County of Honolulu

Serviced by:

Sheriff Officer Norman K. Hanneken

Date 8-9-89

Received by [signature]

Date 8/9/89

Position Dep Corp Counsel

[signature]
Harvey H. Toda Affiant
pro se for Petitioner

Subscribed and sworn to before Me
tnis 9th day of August, 1989.

[signature]
Notary Public
City and County of Honolulu
State of Hawaii

My Commission expires on:
10/25/92

JENNIFER [illegible] 10/25/92
NOTARY PUBLIC
STATE OF HAWAII

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED

Supreme Court, U.S.
F I L E D
SEP 27 1989
JOSEPH F. SPANIOL
CLERK

No. 88-2141

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HARVEY H. TODA,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF

HARVEY H. TODA, pro se
1363 Hoowali Street
Pearl City, HI. 96782
Phone:(808) 456-1328

Considerations Governing Review on Certiorari: Under Rule 17 .1 indicates "there are special and important reasons" and the following statement is entered.

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CONSTITUTIONAL QUESTION:

Additionally, it is hoped that the CONSPIRACY OF TORT, is subjected for answering every case need, as it applies when TAXES are billed and paid for.

That, Constitutional needs must be met and though sub-allegations are also Constitutionally met, it is not a part of the SUIT.

That, CONSPIRACY OF TORT, is the TAXES which are billed for and paid, violating the Constitution, if not reimbursed, compromised, and is known by the Respondent.

SIGNING OF PAPERS: Respondent had requested to sign-off papers not subject to the SUIT.

Thus, Criminal CONSPIRACY, Procedural due process or change of zoning was not applied for, also for infringement of Contracts, nor for ex post facto violations, for the Civil Rights Act violations, Family Intrusion acts, Notifications, and no SUITS by the corporation to have two branches of government into the corporation, and in part "if" the cases were "true" would I sign this paper, and yes, it was signed.

It was irrelevant to say that a summary judgment existed, when the above items are to show a Constitutional cause existed.

DATED: Honolulu, Hawaii, September 7, 1989.

Harvey T. Toda, pro se
for Petitioner

CERTIFICATE OF SERVICE

I, Harvey H. Toda, provides 3 copies of this report under 88-2141, a supplementary brief for the Writ of Certiorari, through the Sheriff's Office of the State of Hawaii, to:

CITY AND COUNTY OF HONOLULU
Richard D. Wurdeman
Corporation Counsel
Maria C. Avinante-Tanaka
Deputy Corporation Counsel
530 S. King & Punchbowl Sts.
Honolulu, Hawaii 96813
Phone: (808) 523-4704

Attorneys for Respondent

DATED: Honolulu, Hawaii,

September 7, 1989.

Harvey H. Toda pro se
for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-2141

HARVEY M. TODA,

Petitioner,

V.

CITY AND COUNTY OF HONOLULU,

Respondent.

PROOF OF SERVICE

State of Hawaii)
) SS.
City and County of Honolulu)

Affiant, Norman K. Mau Kee, after being duly sworn, disposes and says that pursuant to Court rules the SHERIFF'S OFFICER of the State of Hawaii, served the Supplemental Brief, to:

CITY AND COUNTY OF HONOLULU
Richard D. Wurdeman
Corporation Counsel
Maria C. Avinante-Tanaka
Deputy Corporation Counsel
Honolulu, Hawaii 96813

Attorneys for Respondent

Serviced by: NORMAN K. MAUNAKEA , Deputy Sheriff

Sheriff Officer Norman K. Maunakea

Date 9-7-89

Received by

Date 9/7/89

Position Deputy Corporation Counse

Norman K. Maunakea

NORMAN K. MAUNAKEA, DEPUTY SHERIFF

Subscribed and sworn to before Me
this 8 day of September, 1989.

Notary Public
City and County of Honolulu
State of Hawaii

My Commission expires on: 12-8-92

AFFIDAVIT OF PROOF OF SERVICE
BY OUT OF STATE DEPUTY SHERIFF

STATE: IN THE STATE OF WASHINGTON, D.C.

COURT: U.S. SUPREME COURT

CAPTION: HARVEY H. TODA, pro se

Plaintiff

VS.

CITY & COUNTY OF HONOLULU

Respondent

CASE NO. 88-2141

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

The undersigned, being first duly sworn on oath, deposes and says that he/she is a duly authorized and qualified DEPUTY SHERIFF OF THE STATE OF HAWAII, authorized by laws to serve legal process, a citizen of the United States, resident of the State of Hawaii and over the age of eighteen years, not a party to nor interested in the entitled action.

DOCUMENTS SERVED: Supplemental Brief

The above listed documents were personally served upon the Defendant/Respondent, the CITY AND COUNTY OF HONOLULU, STATE OF HAWAII, on the date, time and place as set forth below:

NAME	DATE/TIME SERVED	PLACE OF SERVICE
CITY & COUNTY OF HONOLULU	9/7/89 1:15PM	[illegible]
thru JONATHAN J. CIRIN,		530 S. King St., Honolulu, HI. [illegible]
Deputy Corporation Counsel		

DATED: HONOLULU, HAWAII

DEPUTY SHERIFF, STATE OF HAWAII
NORMAN E. MAUI KEE

Subscribed and sworn to before me this
day of , 19

NOTARY PUBLIC, STATE OF HAWAII

My Commission Expires: